

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
YEL-BOM'S SERVICE CENTER, INC. :
T/A MORE PETROLEUM :
for Revision of a Determination or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period March 1, 1981 :
through August 31, 1982. :

DETERMINATION

In the Matter of the Petition :
of :
PAUL MOBLEY, :
OFFICER OF YEL-BOM'S SERVICE CENTER, INC. :
for Revision of a Determination or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period March 1, 1981 :
through August 31, 1982. :

Petitioner Yel-Bom's Service Center, Inc. T/A More Petroleum, 20 Sheridan Boulevard, Inwood, New York 11696, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1981 through August 31, 1982 (File No. 801302).

Petitioner Paul Mobley, officer of Yel-Bom's Service Center, Inc., 981 Willmohr Street, Brooklyn, New York 11212, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1981 through August 31, 1982 (File No. 801298).

A hearing was commenced before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on October 28, 1987 at 1:50 P.M., and was continued to conclusion at the same location before the same Administrative Law Judge on January 6, 1988 at 9:15 A.M., with all briefs to be submitted by April 14, 1988. Petitioners appeared by Stanley Cohen, Esq. The Audit Division appeared by William F. Collins, Esq. (Kevin A. Cahill, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined, upon audit, that petitioner Yel-Bom's Service Center, Inc. underreported and underpaid sales taxes during the period March 1, 1981 through August 31, 1982.

II. Whether, if so, the Audit Division has met its burden of proving that the imposition of a fraud penalty in addition to the assessment of taxes was appropriate.

III. Whether, assuming that a fraud penalty is not warranted in this matter, the alternative imposition of penalty pursuant to Tax Law § 1145 former (a)(1) as requested by the Audit Division is appropriate.

IV. Whether petitioner Paul Mobley was a person responsible for the collection and remittance of tax on behalf of petitioner Yel-Bom's Service Center, Inc. within the meaning and intent of Tax Law §§ 1131(1) and 1133(a) during the period in question.

FINDINGS OF FACT

1. On April 20, 1984, the Audit Division issued to petitioner Yel-Bom's Service Center, Inc. T/A More Petroleum ("Yel-Bom's") a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period March 1, 1981 through August 31, 1982 in the amount of \$196,800.44, plus a fraud penalty (Tax Law § 1145 former [a][2]) and interest. On the same date, the Audit Division issued a second Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the identical period and in the identical amounts (including the fraud penalty) to petitioner Paul Mobley, asserting his liability as an officer of Yel-Bom's for the taxes assessed against Yel-Bom's.

2. The aforementioned notices were issued as the result of an Audit Division field audit of the business operations of Yel-Bom's. During the period in issue, Yel-Bom's operated a gasoline station located at 20 Sheridan Boulevard, Inwood, New York. The station location consisted of a building and six gasoline pumps with twelve nozzles for dispensing gasoline. In general, at least nine of such nozzles were always in operable condition. The station location included three underground 3,000-gallon gasoline tanks. Yel-Bom's sold only gasoline and did not have facilities for nor did it perform any repair services or parts sales. The station location was owned by General Oil Company ("General"). General leased the station location to Yel-Bom's and, for most of the period in question, was also Yel-Bom's supplier of gasoline.

3. Yel-Bom's sole shareholder was petitioner Paul Mobley, who was also Yel-Bom's president. Mr. Mobley commenced operation of Yel-Bom's in or about February or March of 1981 as a sole proprietorship, and shortly thereafter incorporated Yel-Bom's. Yel-Bom's leased the station location for approximately \$3,000.00 in rent per month, in addition to which Yel-Bom's paid the expenses of employee wages, routine maintenance, sanitation and utilities. Yel-Bom's was an independent station (as opposed to a station operated or leased by a branded or major oil company, e.g., Shell, Mobil, Amoco). Yel-Bom's did not sell gasoline via credit card.

4. In or about August of 1982, the Audit Division commenced its audit of the business operation of Yel-Bom's. An auditor visited the premises in order to gather information as to the business location and its size and method of operation. On the day of this August 1982 visit, the auditor noted pump prices (selling prices) for gasoline of \$1.24-9/10 per gallon (regular gasoline) and \$1.29-9/10 per gallon (unleaded gasoline). Yel-Bom's did not sell premium grades of gasoline.

5. The auditor requested that Mr. Mobley provide Yel-Bom's business books and records, but was able to secure only a checkbook and certain cancelled checks. The auditor noted that there were no daily sales sheets, no general ledger, no delivery invoices and no records of daily pump prices, nor any worksheets accompanying Yel-Bom's tax returns. The auditor was advised

that Mr. Mobley provided figures as to sales and purchases to his accountant who then prepared Yel-Bom's sales tax returns.

6. As an initial step, the auditor compared Yel-Bom's sales as reported per its Federal income tax return for the fiscal year ending April 30, 1982 (\$219,488.00) to a partial listing of Yel-Bom's bank deposits (\$308,481.62). The auditor could determine no explanation for the \$88,993.60 difference between these two items nor was any explanation offered on behalf of Yel-Bom's. The auditor also initially reviewed gasoline purchases according to the check stubs in petitioner's checkbook for the period spanning March 1981 through August 1982, determining the purchase of 369,882 gallons of gasoline at a cost of \$426,904.62. The auditor utilized a selling price of \$1.25 per gallon and applied the same to the number of gallons purchased (369,882) to compute audited taxable sales of \$462,354.00. This figure, when compared to taxable sales as reported per Yel-Bom's sales tax returns (\$269,604.00), resulted in additional taxable sales of \$192,750.00 with sales tax computed thereon in the amount of \$13,955.68.

7. Subsequent to the initial audit procedures described above the auditor requested, and received from General, information as to Yel-Bom's purchases of gasoline. The auditor utilized this General Oil Company information for the period March 1981 through February 1982, at which time General entered into Chapter 11 (bankruptcy) proceedings. Thereafter Yel-Bom's supplier was Pride Oil Company ("Pride"). Since the auditor did not have any information from Pride, he compared Yel-Bom's reported gallonage versus General's third party information as to gallonage and determined a reporting error of 551 percent. This error rate was then applied as the means of determining gallonage purchased during the period when Pride was Yel-Bom's supplier (February 1982 through the end of the audit period). This purchase information from General (including application of the described error rate) indicated purchases by Yel-Bom's in the amount of 2,408,232 gallons for the audit period. The auditor applied the same \$1.25 per gallon selling price to said purchases and computed audited taxable sales of \$3,010,290.00. This figure resulted in a tax liability of \$215,993.08 which, when compared to the amount of tax reported and paid by Yel-Bom's (\$19,192.64), resulted in a deficiency of \$196,800.44.

8. Without further records or explanation for the vast discrepancies described above, the auditor determined to rely upon the third party gasoline purchase information from General and, accordingly, issued the notice of determination herein contested in the amount of \$196,800.44.

9. As related to this proceeding, General, Pride, and Inwood Trucking Company ("Inwood") were, during the period in issue, owned or controlled by the same individuals. These individuals did not, however, own or control Yel-Bom's. Inwood provided all trucking services to General and Pride. Deliveries were made to Yel-Bom's by Inwood's delivery trucks, with the records of such deliveries being forwarded from Inwood to General for billing to Yel-Bom's. Yel-Bom's location was directly across the street from General and General utilized Yel-Bom's location as a "dumping station". More specifically, as delivery trucks returned to General's terminal, any remaining amounts of gasoline (partial loads) were delivered into Yel-Bom's underground tanks so that the trucks could start their next round of deliveries from General carrying full loads out of General's terminal. These partial or "broken" loads would be in amounts of 250, 500, 1,000 or 1,500 gallons or some other partial amount. By contrast, a "city spec" truck (a truck in compliance with New York City gasoline transport regulations) could carry a full load of 3,000 gallons, and tractor-trailers carried between 8,500 to 9,000 gallons. Inwood's trucks generally made deliveries on a 24-hour basis, according to the demand for product. It was not specified as to whether the practice of using Yel-Bom's as a dumping station continued into and during the period when Pride was Yel-Bom's supplier.

10. Yel-Bom's location was in an economically-depressed area subject to high crime rates. During the period in question, Yel-Bom's office location was robbed allegedly on an average of twice per week. The result of these robberies was generally that some cash was taken and that records were strewn about the office. Yel-Bom's submitted in evidence a series of police reports detailing robberies at the station location. These reports indicated a total of 16 separate robberies listing various amounts of currency taken, ranging in dollar amount from \$15.00 to a high of \$390.00. Three of such robberies, however, occurred after the period in issue. There were a number of other gasoline stations in the immediate vicinity of Yel-Bom's station, many of which sold branded or major oil company brands of gasoline (e.g., Shell, Mobil, Amoco).

11. Petitioner Paul Mobley did not work at the station location on a day-to-day basis, but visited the station approximately three days per week in order to check on the records and the operation of the station. Mr. Mobley commenced doing business at the station at a time when the station was vacant. The station was operated initially from 6:00 A.M. to midnight and then, in approximately June of 1981, the hours were extended from 6:00 A.M. to 2:00 A.M., with Yel-Bom's employing a watchman to stay on the premises from 2:00 A.M. until 6:00 A.M. However, no sales of gasoline occurred between 2:00 A.M. and 6:00 A.M.

12. In terms of records, the only credit sales made by Yel-Bom's were to employees of Inwood, General and Pride who purchased gasoline for their cars. Petitioner kept a daily record of these customers' purchases, which amounts were reconciled and paid monthly. After payment, the daily records and, apparently, the monthly reconciliations were destroyed. It was alleged that daily pump readings were taken and that a ledger of sales and purchases was maintained by a bookkeeper who worked at the station location one day per week. However, no documentary evidence of such readings was provided, nor was any such ledger, or portion thereof, introduced. Mr. Mobley would take dipstick readings on the tanks when he was at the station and try to match his results with the billings for product as received from General. Discrepancies in amounts were, according to Mr. Mobley's testimony, taken up with and resolved through Inwood which entity had the relevant delivery records.

13. Yel-Bom's underground tanks were tested in 1981 to determine if any leakage was occurring. This 1981 test proved negative. However, in August of 1983, a second test was performed which determined leakage in two of the three underground tanks. One of the tanks was repaired the same day, while the second tank was required to be closed and removed.

14. Although Yel-Bom's tax returns were not offered in evidence, Mr. Mobley admitted at hearing that he signed the sales tax returns during the period in question.

SUMMARY OF PETITIONERS' POSITION

15. Petitioners assert that the third party information relied upon by the auditor was inaccurate. More specifically, petitioners assert that the combination of Yel-Bom's being used as a dumping station for partial loads, together with General's entry into Chapter 11 proceedings, must have resulted in major inaccuracies in General's records such that Yel-Bom's is reflected thereon as having received far in excess of the gallonage that it reported on its returns. Petitioners do not dispute that adequate records were not maintained, but rather challenge the accuracy of the third party information relied on by the Audit Division. Petitioners assert that it is not possible for the station to have done the volume attributed to it by the third party information, and assert that partial loads totalling approximately 1,500 gallons per day were taken by the station on average, except for an occasional 3,000-gallon load during the week and a full 3,000-gallon delivery on most weekends. Petitioners also assert that given the type of

neighborhood, the number of robberies and the high level of competition in the area, Yel-Bom's could not have conducted its business so as to achieve sales and earn profits as are reflected by the computational results of the Audit Division's audit.

CONCLUSIONS OF LAW

A. That where, as here, adequate and complete records are not maintained and made available for audit, there is ample authority for the Audit Division's resort to indirect audit methodologies in determining the amount of sales and use taxes owed by a vendor (Tax Law §§ 1138, 1135). Here, as noted, there is no question that adequate records were not maintained and that the auditor was entitled to utilize such information as was available, including third party information from petitioners' supplier, as a means to determine the proper amount of petitioners' tax liability. Petitioners' only dispute centers on the accuracy of the gallonage reported via the third party information.

B. That petitioners have not proven the Audit Division's assessment herein was inaccurate. Petitioners' presentation consisted largely of testimonial allegations as to possible reasons for inaccuracies in the records supplied to the Audit Division by General. However, in contrast, it is noted that even the initial audit work indicated a partial listing of Yel-Bom's bank deposits exceeded its reported sales per Federal returns by nearly \$89,000.00. Contrary to petitioners' assertions, it is not implausible that Yel-Bom's could have sold the volume of gasoline shown as delivered to it per the third party information. In this regard, it is noted that the station had six pumps and twelve gasoline dispensing nozzles of which, even according to petitioner Paul Mobley's testimony, at least nine nozzles were always in working order. It is also noted, in terms of recordkeeping, that while Yel-Bom's may not always have received a delivery ticket, there were delivery records maintained by Inwood with copies sent to General Oil Company. Presumably, petitioners could have obtained from Inwood information as to deliveries to the station location by Inwood in order to dispute (or refute) the numbers shown on the General verification. Petitioners' contentions regarding robberies and leaking tanks neither excuse the lack of recordkeeping nor explain the vast discrepancy in gallonage or the other noted reporting inconsistencies. Further, the evidence presented does not warrant acceptance of petitioners' allegations of recordkeeping inaccuracies at General. Without any documentation, including significantly the lack of any records presumably still available from Inwood, petitioners' assertions that confusion over the gallonage delivered to Yel-Bom's as a "dumping station" and the potential for erroneous bookkeeping by General's employees due to low morale over General's pending bankruptcy are, at best, unpersuasive. In sum, petitioners have totally failed to meet their burden of proving that either the method used to arrive at the assessment or the assessment itself was erroneous (see ___ Matter Sol Wahba, Inc. v. State Tax Commission, 127 AD2d 943).

C. That in 1975 the New York State Legislature added the so-called "fraud penalty" to Article 28 of the Tax Law by adding section 1145(a) (former [2]) to the Tax Law. Section 1145(a) (former [2]) provided, in pertinent part:

"If the failure to file a return or to pay over any tax to the tax commission within the time required by this article is due to fraud, there shall be added to the tax a penalty of fifty percent of the amount of tax due (in lieu of the penalty provided for in subparagraph (i) of paragraph one) plus interest...."

The Legislature modeled this fraud penalty on the penalty provisions already existing with

respect to deficiencies of, inter alia, income tax (see ___ 1975 NY Leg Ann, at 350). "The burden of showing fraud under section 1145(a)(2) has been consistently interpreted to reside with the [Audit] Division." (Matter of Ilter Sener d/b/a Jimmy's Gas Station, Tax Appeals Tribunal, May 5, 1988.) In turn, "the standard of proof necessary to support a finding of fraud requires 'clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representation, resulting in deliberate nonpayment or underpayment of taxes due and owing.' (See ___, Matter of Walter Shutt and Gertrude Shutt v. State Tax Commission, State Tax Comm., July 13, 1982.)" (Matter of Ilter Sener, supra.)

D. That upon review of the evidence presented, the Audit Division has sustained its burden of proving that the imposition of fraud penalty in this matter is warranted. The evidence established that petitioner Yel-Bom's consistently underreported its taxable sales and its tax liability during the period at issue. In addition, nearly no records were maintained by petitioners, with returns prepared on the basis of statements by Mr. Mobley to the accountant describing Yel-Bom's purchases and sales. Similar factors have been considered to be circumstantial evidence of fraud (see ___, e.g., Gromacki v. Commissioner, 361 F2d 727; Miliken v. Commissioner, 798 F2d 830). Included in the factors considered in a weighing of whether fraud is appropriate in this matter is the magnitude of the underreporting. In gallonage alone, Yel-Bom's checkbook stubs indicated nearly 370,000 gallons purchased whereas information received from General indicated over 2,400,000 gallons purchased. Yel-Bom's sales tax returns for the period indicated taxable sales of \$269,604.00 and its checkbook stubs reported purchases at a cost of \$426,904.62, a situation wherein purchases exceeded sales by nearly \$157,000.00. Such factors alone support a conclusion of intentional acts of false representation and militate against any belief that the underreporting and underpayment here was the result of negligence, gross or otherwise. Finally, it is not irrelevant that petitioner's president and sole shareholder also owned and was involved in the operation of other gasoline stations. Accordingly, based on all of these factors, as supported by the evidence presented, the Audit Division has sustained its burden of proving that the imposition of a fraud penalty in this matter was warranted.

E. That, in view of the foregoing, Issue III becomes moot.

F. That petitioners offered no challenge to the assertion that Paul Mobley was a person responsible to collect and remit taxes on behalf of Yel-Bom's Service Center, Inc. pursuant to the terms of Tax Law §§ 1131(1) and 1133(a). Accordingly, in view of the evidence that Mr. Mobley was not only president and sole shareholder of Yel-Bom's Service Center, Inc., but also provided the information for and signed its returns, and was the person with the overall authority to control the operation of the station, Mr. Mobley was properly assessed as a person responsible for taxes determined to be due from Yel-Bom's Service Center, Inc.

G. That the petitions of Yel-Bom's Service Center, Inc. T/A More Petroleum and of Paul Mobley, as officer of Yel-Bom's Service Center, Inc., are hereby denied and the notices of determination and demands for payment of sales and use taxes due issued to each of such petitioners on April 20, 1984 are sustained.

DATED: Albany, New York
August 19, 1988

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE